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SERVICE DATE - FEBRUARY 3, 1999

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32279

NORFOLK AND WESTERN RAILWAY COMPANY  
— PETITION FOR DECLARATORY ORDER —  
LEASE OF LINE IN COOK AND WILL COUNTIES, IL,  
TO COMMUTER RAIL DIVISION  
OF THE REGIONAL TRANSPORTATION AUTHORITY  
OF NORTHEAST ILLINOIS

Decided: January 27, 1999

The prior decision of the Interstate Commerce Commission (ICC) in this proceeding was vacated and the matter was remanded to the ICC by the United States Court of Appeals for the District of Columbia Circuit, in United Transp. Union—Ill. Legislative Bd. v. ICC., 52 F.3d 1074 (D.C. Cir. 1995), for a further explanation of whether the agency has jurisdiction over the operations of a commuter rail line.

On May 28, 1993, the ICC granted a petition of Norfolk and Western Railway Company (NW) for a declaratory order and ruled that it did not have jurisdiction over the lease of a 32.9-mile rail line, in Cook and Will Counties, IL, to the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois (METRA).<sup>1</sup> By further decision served November 19, 1993, in N&W Ry., Co.—Lease of Line in Cook & Will Count., IL, 9 I.C.C.2d 1155 (1993), the ICC denied a petition to reopen by the United Transportation Union, Illinois Legislative Board (UTU), and affirmed its initial declaratory order. UTU appealed, and the court's remand followed. That remand sought an ICC explanation for the basis for its jurisdictional finding and directed the ICC to examine whether or not METRA was a carrier subject to ICC regulatory authority.

DISCUSSION AND CONCLUSIONS

Even though the issue of whether METRA was a carrier under the prior law may have been a close question, METRA has never been a rail carrier subject to the Board's jurisdiction under

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<sup>1</sup> Under the lease agreement, METRA would provide commuter rail passenger service and NW would retain an easement to provide all common carrier freight service on the line. The ICC concluded that the lease did not involve the transfer of common carrier rights or obligations subject to the ICC's jurisdiction.

current law. Under 49 U.S.C. 10501(c),<sup>2</sup> as enacted by the ICC Termination Act of 1995 (ICCTA), “the Board does not have jurisdiction ... over mass transportation provided by a local governmental authority” such as METRA. The Board has already recognized this, in Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, d/b/a Metra—Exemption—Tariff Filing Requirements, No. 41506 (STB served Mar.29, 1996), in which it was specifically found that “METRA’s commuter rail operations constitute mass transportation provided by a local governmental authority.” Thus, the court remand is essentially moot.

Our jurisdiction is conferred and constrained by the terms of ICCTA. Under section 204(b)(1) of ICCTA:

The provisions of this Act shall not affect any proceedings or any application for any license pending before the Interstate Commerce Commission at the time this Act

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<sup>2</sup> (c)(1) In this subsection—

(A) the term ‘local governmental authority’—

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term ‘mass transportation’ means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to—

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before the effective date of the ICC Termination Act of 1995. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

takes effect, insofar as those functions are retained and transferred by this Act; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

Moreover, under section 204(c):

(1) This Act shall not affect suits commenced before the date of the enactment of this Act, except as provided in paragraphs (2) and (3). In all such suits, proceeding shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted.

(2) Any suit by or against the Interstate Commerce Commission begun before the effective date of this Act shall be continued, insofar as it involves a function retained and transferred under this Act, with the Board (to the extent the suit involves functions transferred to the Board under this Act) or the Secretary (to the extent the suit involves functions transferred to the Secretary under this Act) substituted for the Commission.

(3) If the court in a suit described in paragraph (1) remands a case to the Board or the Secretary, subsequent proceedings related to such case shall proceed in accordance with applicable law and regulations as in effect at the time of such subsequent proceedings.

The court remanded this case to the ICC before ICCTA was enacted,<sup>3</sup> and, in general, the “function” of approving (or exempting) leases of rail lines from one railroad to another was transferred to the Board by ICCTA. But the ICC did not exercise that function in this proceeding.

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<sup>3</sup> If the matter had been remanded to the Board after ICCTA became effective, we would be obliged, in any event, to apply the new law, under the plain terms of the statute. In that event, clearly, the subject lease transaction would be deemed exempt from the Board’s jurisdiction. Likewise, if that consummation had occurred after the amendment of the statute and the creation of the Board, the Board certainly would have had no jurisdiction over the transaction under section 11323.

Nor can we now exercise that function with regard to commuter railroads such as METRA, which are now beyond our jurisdiction. That is, this transaction is now a one-railroad transaction over which we do not have jurisdiction under 49 U.S.C. 11323 (former 49 U.S.C. 11343). And, so long as the lease does not interfere with the lessor railroad's ability to continue to satisfy its common carrier obligation, which the ICC has already found and the reviewing court did not question, we do not have jurisdiction under 49 U.S.C. 10901 either. The ICC's action in this case was, fundamentally, advisory in nature; it did not confer a license, an exemption, or any substantive right upon METRA. The ICC issued a declaratory order, with which the court found fault and which the court thus vacated and remanded for further consideration. The ICC's order, in substance, advised METRA that it was unnecessary to file an application seeking the ICC's approval of the subject lease—i.e., that it was not necessary for the ICC to exercise its regulatory function in connection with this particular lease. The court has vacated that advice in issuing its remand, but shortly thereafter the governing law was unequivocally amended, rendering the transaction beyond our jurisdiction because of METRA's noncarrier status.

Accordingly, we will discontinue this proceeding for lack of jurisdiction over the subject matter.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.
2. This decision will be effective 30 days after its service date.

By the Board, Chairman Morgan and Vice Chairman Clyburn.

Vernon A. Williams  
Secretary